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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JULIO C. NAVAS,

Case No. 3:18-cv-00019-MMD-WGC

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Plaintiff,

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

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v.

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JEROME POLAHA, et. al.,

Defendants.

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This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

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Before the court is Plaintiff's Application to Proceed in Forma Pauperis (IFP) (ECF Nos.

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5, 7) and pro se, inmate Complaint (ECF No. 1-1, exhibits at ECF No. 1-2).

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I. IFP APPLICATION

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A person may be granted permission to proceed IFP if the person "submits an affidavit that

includes a statement of all assets such [person] possesses [and] that the person is unable to pay

such fees or give security therefor. Such affidavit shall state the nature of the action, defense or

appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v.*

Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all

actions filed IFP, not just prisoner actions).

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1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
 2 particularity, definiteness and certainty.”” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 3 (quoting *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). A litigant need not “be
 4 absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
 5 335 U.S. 331, 339 (1948).

6 When a prisoner seeks to proceed without prepaying the filing fee:
 7 [I]n addition to filing the affidavit filed [as described above], [the prisoner] shall
 8 submit a certified copy of the trust fund account statement (or institutional
 9 equivalent) for the prisoner for the 6-month period immediately preceding the filing
 of the complaint or notice of appeal, obtained from the appropriate official of each
 prison at which the prisoner is or was confined.

10 28 U.S.C. § 1915(a)(2). Notwithstanding the foregoing:

11 (1) ... [I]f a prisoner brings a civil action...[IFP], the prisoner shall be required to
 12 pay the full amount of a filing fee. The court shall assess and, when funds exist,
 13 collect, as a partial payment of any court fees required by law, an initial partial
 14 filing fee of 20 percent of the greater of --
 15 (A) the average monthly deposits to the prisoner’s account; or
 16 (B) the average monthly balance in the prisoner’s account for the 6-month period
 17 immediately preceding the filing of the complaint or notice of appeal.
 18 (2) After payment of the initial partial filing fee, the prisoner shall be required to
 19 make monthly payments of 20 percent of the preceding month’s income credited to
 20 the prisoner’s account. The agency having custody of the prisoner shall forward
 21 payments from the prisoner’s account to the clerk of the court each time the amount
 22 in the account exceeds \$10 until the filing fees are paid.

23 28 U.S.C. § 1915(b)(1), (2).

24 Plaintiff’s certified account statement indicates that his average monthly balance for the
 25 last six months was \$1.88, and his average monthly deposits were \$69.21.

26 Plaintiff’s application to proceed IFP should be granted. He should be required to pay an
 27 initial partial filing fee in the amount of \$13.84 (20 percent of \$69.21). Thereafter, whenever his
 28 prison account exceeds \$10, he should be required to make monthly payments in the amount of
 twenty percent of the preceding month’s income credited to his account until the \$350 filing fee is
 paid.

II. SCREENING

A. Standard

29 “The court shall dismiss the case at any time if the court determines that ... the action or

1 appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or
 2 (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
 3 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed IFP, whether or not the plaintiff is
 4 incarcerated. *See Lopez*, 203 F.3d at 1129; *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001)
 5 (per curiam).

6 In addition, “[t]he court shall review, before docketing, if feasible or, in any event, as soon
 7 as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from
 8 a governmental entity or office or employee of a governmental entity.” 28 U.S.C. § 1915A(a). “On
 9 review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the
 10 complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief
 11 may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.”
 12 28 U.S.C. § 1915A(b)(1)-(2).

13 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 14 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 15 28 U.S.C. § 1915A(b)(1) track that language. Thus, when reviewing the adequacy of a complaint
 16 under 28 U.S.C. § 1915(e)(2)(B)(ii) or 28 U.S.C. § 1915A(b)(1), the court applies the same
 17 standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th
 18 Cir. 2012). Review under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab.*
 19 *Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

20 In reviewing the complaint under this standard, the court must accept as true the
 21 allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts
 22 in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted).
 23 Allegations in pro se complaints are “held to less stringent standards than formal pleadings drafted
 24 by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation
 25 omitted).

26 A complaint must contain more than a “formulaic recitation of the elements of a cause of
 27 action;” it must contain factual allegations sufficient to “raise a right to relief above the speculative
 28 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain

1 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
 2 cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* §
 3 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough facts to state a
 4 claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
 5 678 (2009).

6 A dismissal should not be without leave to amend unless it is clear from the face of the
 7 complaint that the action is frivolous and could not be amended to state a federal claim, or the
 8 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
 9 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

10 **B. Plaintiff's Complaint**

11 Plaintiff, who is incarcerated in the Nevada Department of Corrections' (NDOC) Lovelock
 12 Correctional Center (LCC), filed his pro se complaint pursuant to 42 U.S.C. § 1983. The complaint
 13 names Washoe County Judge Jerome M. Polaha; Washoe County Deputy District Attorney Joseph
 14 Plater; Family Court Judge Deborah Schumacher; Court Clerk Ronald Lontive, Jr.; and Nurse Lilly
 15 Clarkson. (ECF No. 1-1 at 2-3.)

16 For the reasons set forth below, the court recommends that Plaintiff's complaint be
 17 dismissed.

18 In essence, Plaintiff takes issue with a criminal prosecution and conviction for sexual
 19 assault, while also mentioning an order for the sale of his home in connection with a divorce. He
 20 blames the defendants for his fifteen-year prison sentence. He asks that the defendants assets, bank
 21 accounts and tax returns be seized, and that he be set free.

22 Plaintiff alleges that Judge Polaha sentenced him for sexual assault of three illegal aliens,
 23 who were found to be lying in an evidentiary hearing.

24 Judges are entitled to absolute judicial immunity for acts performed in their official
 25 capacity, as Plaintiff has alleged here. *See In re Castillo*, 297 F.3d 940, 947 (9th Cir. 2002) (judicial
 26 immunity is "a 'sweeping form of immunity' for acts performed by judges that relate to the
 27 'judicial process.'") "This absolute immunity insulates judges from charges of erroneous acts or
 28 irregular action, even when it is alleged that such action was driven by malicious or corrupt

1 motives, ... or when the exercise of judicial authority is ‘flawed by the commission of grave
 2 procedural errors.’”) (citations omitted); *see also Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir.
 3 1986) (en banc); *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996) (“The judicial or quasi-
 4 judicial immunity available to federal officers is not limited to immunity from damages, but
 5 extends to actions for declaratory, injunctive and other equitable relief.”).

6 Plaintiff alleges that Deputy District Attorney Joseph Plater helped affirm Judge Polaha’s
 7 malicious prosecution of Plaintiff.

8 State prosecutors are absolutely immune from section 1983 actions when performing
 9 functions “intimately associated with the judicial phase of the criminal process.” *Garmon v.*
 10 *County of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016) (citation omitted). This includes the
 11 initiation of a prosecution and presentation of the State’s case, as well as professional evaluation
 12 of evidence assembled and preparation of it for trial. *Id.*

13 Plaintiff alleges that Judge Deborah Schumacher ordered his sole and separate property to
 14 his ex-wife.

15 Judge Schumacher is also entitled to absolute judicial immunity.

16 Plaintiff alleges that Court Clerk Ronald Lontive, Jr., signed his residence deed.

17 Court clerks have absolute quasi-judicial immunity from damages for civil rights violations
 18 when they perform tasks that are an integral part of the judicial process, as Plaintiff has alleged
 19 here. *Morrison v. Jones*, 607 F.2d 1269, 1273 (9th Cir. 1979).

20 Finally, Plaintiff states that Lilly Clarkson was a nurse whom he contends “affirm[ed] the
 21 sexual assault of an illegal alien drug trafficker 11 year old from mexico,” that he claims was lying.
 22 (ECF No. 1-1 at 3.) To state a claim pursuant to section 1983, a Plaintiff must allege a violation of
 23 rights protected by the Constitution or created by federal law caused by a person acting under color
 24 of state law. A private party, such as a nurse who performed an examination of a minor as Plaintiff
 25 alleges here, does not act under color of state law. *See Price v. Hawaii*, 939 F.2d 702, 707-08 (9th
 26 Cir. 1991).

27 For the foregoing reasons, Plaintiff’s complaint should be dismissed with prejudice.

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III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

3 (1) **GRANTING** Plaintiff's IFP application; however, Plaintiff should be required to pay,
4 through NDOC, an initial partial filing fee in the amount of \$13.84, within thirty days of the entry
5 of any order adopting and accepting this Report and Recommendation. Thereafter, whenever his
6 prison account exceeds \$10, he should be required to make monthly payments in the amount of
7 twenty percent of the preceding month's income credited to his account until the full \$350 filing
8 fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk
9 should be directed to **SEND** a copy of any order adopting and accepting this Report and
10 Recommendation to the attention of **Chief of Inmate Services for the Nevada Department of**
11 **Prisons**, P.O. Box 7011, Carson City, NV 89702.

12 (2) The Complaint (ECF No. 1-1) should be **FILED**.

13 (3) The action should be **DISMISSED WITH PREJUDICE.**

14 The Plaintiff should be aware of the following:

15 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
16 this Report and Recommendation within fourteen days of receipt. These objections should be titled
17 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by
18 points and authorities for consideration by the district judge.

19 2. That this Report and Recommendation is not an appealable order and that any notice of
20 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
21 until entry of judgment by the district court.

22 | DATED: June 5, 2018.

Walter G. Cobb

WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE